

Re: Colbert Landfill
Ref: CERCLA 88-004

DECISION DOCUMENT

PREAUTHORIZATION OF A CERCLA §111(a) CLAIM

Colbert Landfill Site - Spokane County, Washington

STATEMENT OF AUTHORITY

Section 111 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601 et seq., as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA) authorizes the reimbursement of response costs incurred in carrying out the National Contingency Plan (NCP). Section 112 of CERCLA directs the President to establish the forms and procedures for filing claims against the Hazardous Substances Superfund (the Superfund or the Fund). Executive Order 12580 delegates to the Environmental Protection Agency (EPA) the responsibility for such claims. Executive Order 12580 delegates to EPA the authority to reach settlements pursuant to section 122(b) of CERCLA. The Director of the Office of Emergency and Remedial Response (OERR) is delegated authority to evaluate and make determinations regarding claims (EPA Delegation 14-9, September 13, 1987 and EPA Redelegation 14-9 "Claims Asserted Against the Fund," May 25, 1988).

BACKGROUND ON THE SITE

On September 29, 1987, Robie G. Russell, EPA Regional Administrator for Region X, signed the Record of Decision (ROD) for the Colbert Landfill site (hereinafter referred to as the "Site") (Attachment 1). The ROD selected an interim final remedial action for the site that addresses management of migration of contamination using a groundwater interception system and attempts source control through extraction in areas of highest contaminant concentrations. The remedy is considered to be interim final because the extraction and interception well system will be in operation for decades before remediation is complete and changes in the selected remedial action may be required during that period. In summary, the remedy provides for an alternative drinking water supply, installation of additional monitoring wells to define the plume(s), preliminary selection of the types of treatment systems for each geographic portion of the site, treatability studies for each treatment method, preliminary and final designs, installation of the wells and construction of the treatment system and discharge structure, operation of the systems, monitoring and testing, and development and implementation of institutional controls.

In May 1987, EPA provided members of the public, including the group of potentially responsible parties ("PRPs"), with an opportunity to comment on the remedial investigation and feasibility study (RI/FS) of the Site and in the selection of the preferred

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alternative for cleanup. On January 8, 1988, EPA, pursuant to section 122 of CERCLA, issued special notice letters to three PRPs and notice letters to nine others. In May 1988, EPA and representatives for Spokane County, Key Tronics, Inc., and the U.S. Air Force reached agreement in principle. The agreement provided that two of the PRPs would pay a portion of the cost into a trust fund and that Spokane County would carry out the remedy selected by EPA, and that EPA would reimburse Spokane County for a portion of the costs of implementing the remedy.

On September 12, 1988, Spokane County submitted a formal request for preauthorization as required by section 300.25(d) of the National Contingency Plan (NCP) (40 CFR Part 300).

A consent decree between EPA and Spokane County and Key Tronics is being executed simultaneously with this Decision Document. The Scope of Work, which is appended to the Consent Decree, will be used to implement the remedy selected in the ROD and summarized above.

FINDINGS

Preauthorization (i.e., EPA's prior approval to submit a claim against the Superfund for reasonable and necessary response costs incurred as a result of carrying out the NCP) represents the Agency's commitment that if the response action is conducted in accordance with the preauthorization and costs are reasonable and necessary, reimbursement, subject to any maximum amount of money set forth in the preauthorization decision document, will be had from the Superfund. Preauthorization is a discretionary action by the Agency taken on the basis of certain determinations.

EPA has determined based on its evaluation of relevant documents and Spokane County's request for preauthorization, pursuant to section 300.25(d) of the NCP, that:

- (1) A release or potential release of hazardous substances warranting a response under section 300.68 of the NCP exists at the Colbert Landfill site
- (2) Spokane County has agreed to implement the cost-effective remedy selected by EPA to address the threat posed by the release at the Site;
- (3) Spokane County has demonstrated engineering expertise and a knowledge of the NCP and attendant guidance;
- (4) The activities proposed by Spokane County, when supplemented by the terms and conditions contained herein, are consistent with the NCP; and
- (5) Spokane County has demonstrated evidence of State cooperation.

In summary, while EPA does not accept as fact all of the statements contained in Spokane County's preauthorization request, the preauthorization request demonstrates a knowledge of relevant NCP provisions and EPA guidance for the conduct of a remedial action. The Consent Decree, the terms and conditions of this preauthorization and, in technical matters, the Scope of Work shall govern the conduct of response activities. In the event of any ambiguity or inconsistency between the Request for Preauthorization and this Preauthorization Decision Document with regard to claims against the Fund, the Preauthorization Decision Document and the Consent Decree shall govern. As stated above, in technical matters, the Scope of Work and the Work Plan, when developed by Spokane County and approved by EPA, shall govern the conduct of response activities.

DECISION AND TERMS AND CONDITIONS

I preauthorize Spokane County to submit a claim(s) against the Superfund for an amount not to exceed the lesser of one million four hundred thousand dollars (\$1,400,000), or eleven and one half percent (11.5%) of reasonable and necessary eligible costs, unless such amount is adjusted by EPA pursuant to paragraph 13 below, incurred for remedial design and remedial construction in connection with the remedy set forth in EPA's Record of Decision for the Colbert Landfill site (Exhibit 1 hereto) as specified in the Scope of Work (which is an attachment to the Consent Decree) and the Work Plan when approved by EPA, subject to the terms and conditions set forth below. In the event of any ambiguity or inconsistency between the terms and conditions and the discussion, the terms and conditions shall govern.

- 1) Spokane County, as provide in the Scope of Work attached to the Consent Decree, shall develop and implement a worker health and safety plan which complies with OSHA Safety and Health Standards: Hazardous Waste Operations and Emergency Response (29 CFR Part 1910.120; 51 Federal Register 45654 et seq., December 19, 1986).

Discussion:

Spokane County's request for preauthorization fully addresses plans for worker health and safety. As a term and condition of preauthorization, Spokane County shall develop a worker health and safety plan which will be reviewed by EPA. The health and safety plan when approved by EPA shall satisfy the requirements of OSHA Safety and Health Standards: Hazardous Waste Operations and Emergency Response (29 CFR Part 1910.120, 51 Federal Register 45654 et seq. (December 19, 1986). Spokane County will implement the plan as approved or subsequently revised.

- 2) Pursuant to Section VII of the Consent Decree, the Scope of Work requires that Spokane County submit plans (i.e., Work Plan) for approval. The Work Plan shall including a plan

for air monitoring during air stripping.

- 3) Spokane County shall develop a remedial design in accordance with the Scope of Work and EPA's Remedial Design and Remedial Action Guidance. The remedial design to be developed by Spokane County as specified in the Scope of Work shall insure that all actions undertaken by Spokane County shall be undertaken in accordance with the requirements of all applicable State and Federal laws and regulations and all "applicable" or "relevant and appropriate" Federal and State environmental requirements as identified pursuant to the ROD and pursuant to § 121 of CERCLA. In accordance with Section XXI of the Consent Decree, all activities undertaken by Spokane County off-site shall in addition comply with all required permits, unless an exemption from the requirements of such permits is granted according to law.
- 4) Modification of remedial design elements or performance requirements contained in the remedial design report shall require approval by the Regional Administrator or his/her designee.
- 5) Spokane County shall provide for long-term site management (i.e., operation and maintenance) of the Site sufficient to ensure continuing protection of human health and the environment. The costs of operation and maintenance are not eligible for reimbursement. The Work Plan when developed and approved will differentiate between operation and maintenance activities and pump and treatment activities.
- 6) Spokane County shall develop and implement for remedial design and remedial action:
 - a) Procedures which provide adequate public notice of solicitations for offers or bids on contracts. Solicitations must include the evaluation methods and the criteria for contractor selection. EPA shall have the right to disapprove the selection of the architect or engineer and the construction firm(s) selected by the County.
 - b) Procedures for procurement transactions which provide maximum open and free competition; do not unduly restrict or eliminate competition; and provide for the award of contracts to the lowest, responsive, responsible bidder, where the selection can be made principally on the basis of price. Spokane County and its contractors shall use free and open competition for supplies, services and construction.
 - c) Contracts for construction which include a Differing Site Conditions clause equivalent to that found at 40 CFR §33.1030(4).

- d) Procedures to settle and satisfactorily resolve, in accordance with sound business judgment and good administrative practice, all contractual and administrative issues arising out of preauthorized actions. Spokane County shall issue invitations for bids or requests for proposals; select contractors; approve subcontractors; manage contracts in a manner to minimize change orders and contractor claims; resolve protests, claims, and other procurement related disputes; and handle subcontracts to assure that work is performed in accordance with terms, conditions and specifications of contracts.
 - e) A change order management policy and procedure in accordance with EPA's guidance on State Procurement Under Remedial Cooperative Agreements (OSWER Directive 9375.1-11, June 1988).
 - f) Detailed quality assurance/quality control plans for remedial design activities (e.g., sampling, monitoring, etc.) and construction activities (e.g., sampling, operations, etc.).
 - g) A financial management system that consistently applies generally accepted accounting principles and practices and includes an accurate, current and complete accounting of all financial transactions for the project, complete with supporting documents, and a systematic method to resolve audit findings and recommendations.
- 7) EPA shall have the right to disapprove the project manager selected by Spokane County. Spokane County shall submit to EPA a justification to perform project management in-house or contract it out. The justification shall take into account cost, time, and reliability of in-house versus contracted project management.

Discussion:

Spokane County's request for preauthorization did not contain a justification for its proposal to utilize an in-house project manager as requested in EPA's Preauthorization Guidance (Reasonable Cost, page 7).

- 8) Spokane County shall advise EPA prior to the issuance of a solicitation for construction of the remedy using other than a fixed price contract.

Discussion:

Spokane County's request for preauthorization stated that it anticipates that the contract for construction of Phase II will be based on a fixed price rather than cost reimbursement. EPA's Preauthorization Guidance

(Reasonable Cost, page 7) requests an explanation if the applicant proposes to use other than the formal advertising/sealed bidding procurement method which results in a fixed price contract awarded to the lowest responsive, responsible bidder for construction. Therefore, as a term and condition of preauthorization, Spokane County shall notify EPA prior to issuing a solicitation for construction of Phase II using a negotiated procurement.

- 9) Spokane County shall provide EPA and its agents with site access as set forth in Section XXII of the Consent Decree and shall immediately notify the Agency if they are unable to initiate or complete the preauthorized response action.
- 10) In submitting claims to the Superfund, Spokane County shall:
 - a) Document that response activities were preauthorized by EPA;
 - b) Substantiate all claimed costs through a financial management system as described in paragraph 6(g); and
 - c) Document that all claimed costs were eligible for reimbursement pursuant to this preauthorization and are reasonable and necessary in accordance with the appropriate Federal cost principles.

Discussion:

See paragraph 15 for additional references to the Federal cost principles.

- 11) Spokane County shall maintain all cost documentation and any records relating to its claim for a period of not less than six years from the date on which the final claim has been submitted to the Superfund, and shall provide EPA with access to their records. At the end of the six-year period, Spokane County shall notify EPA of the location of all records. Spokane County shall allow EPA the opportunity to take possession of the records before they are destroyed; this requirement is in addition to the record retention requirement located at Section XIII of the Consent Decree.
- 12) Claims may be submitted against the Superfund only while the Spokane County is in compliance with the terms of the Consent Decree and no more frequently than intervals of:
 - (a) completion of Phase II Design (approximately 3 years);
 - (b) completion of Construction (approximately 4 years); and
 - (c) completion of Startup and Verification (approximately 5 years);

- 13) If the Spokane County finds it necessary to seek to modify the actions that EPA preauthorized, Spokane County may submit to EPA a revised application for preauthorization. In addition, Spokane County may submit a revised application for preauthorization upon EPA's determination of the requirements for final closure of the Site. EPA will consider such an application for preauthorization in a timely manner and will subject to the availability of appropriated funds amend the maximum dollar amount for which Spokane County may submit claims to the Fund. The maximum amount for which Spokane County may submit claims will be determined according to the criteria used in approving the County's application for preauthorization and shall equal 11.5% of reasonable and necessary eligible costs to implement the approved remedy.
- 14) Claims shall be submitted to the Director, Office of Emergency and Remedial Response, EPA, Washington, D.C. EPA shall provide the appropriate form(s) for such claims.
- 15) EPA may adjust claims using the facilities and services of private insurance and claims adjusting organizations or Federal personnel. In making a determination whether costs are allowable, the claims adjuster will rely upon the appropriate Federal cost principles (non-profit organizations - OMB Circular A-122; profit making organizations - 48 CFR Subparts 31.1 and 31.2). Where additional costs are incurred due to acts or omissions by the County, payment of the claim will be adjusted accordingly. EPA may require Spokane County to submit any additional information needed to determine whether the actions taken were reasonable and necessary.
- 16) At least 60 days before filing a claim against the Fund for the remedial action, Spokane County shall present in writing all claims to any person known to Spokane County who may be liable under section 107 of CERCLA for response costs incurred in carrying out the Consent Decree. If the first claim was denied by the responsible party or not responded to, and EPA agrees that there is no reason to believe that subsequent claims would be honored by such responsible party, the denial of the first claim, or lack of response, shall be considered denial of every subsequent claim.
- 17) Payment of any claim shall be subject to Spokane County subrogating to the United States its rights as claimant to the extent to which its response costs are compensated from the Superfund. Further, Spokane County shall cooperate with any cost recovery action which may be initiated by the United States. The Spokane County and Spokane County's contractors shall furnish the personnel, services, documents, and materials needed to assist EPA in the collection of evidence to document work performed and costs expended by Spokane County or the

County's contractors at the Site in order to aid in cost recovery efforts. Assistance shall also include providing all requested assistance in the interpretation of evidence and costs and providing requested testimony. All of Spokane County's contracts for implementing the remedy shall include a specific requirement that the contractors agree to provide this cost recovery assistance.

- 18) Eligible costs are those costs incurred, consistent with the NCP, in carrying out the remedial action, subject to the following limitations:
- a) Costs may be reimbursed only if incurred after the date of this preauthorization;
 - b) Costs may be reimbursed only for design and construction of the remedy at the Site as provided herein. Such costs shall not include any of the oversight costs incurred by EPA or the Department of Ecology for the State of Washington, investigatory costs, or past response costs that were incurred by EPA or the State of Washington prior to the effective date of the Consent Decree.
 - c) Costs incurred for long-term operation and maintenance, as described in paragraph 5, are not eligible for reimbursement from the Superfund.
 - d) Costs incurred for the payment of a person who is listed in the List of Parties Excluded From Federal Procurement or Non-Procurement, established pursuant to Executive Order 12549, May 26, 1988, at the time the contract is awarded shall not be eligible for reimbursement unless Spokane County obtains approval from EPA pursuant to 40 CFR Part 32 prior to incurring the obligation.
 - e) Costs incurred for the payment of contractor claims either through settlement of such claims or an award by a third party may be reimbursed from the Fund to the extent EPA determines that:
 - (i) the contractor claim arose from work within the scope of the contract at issue and the contract was for activities which were preauthorized;
 - (ii) the contractor claim is meritorious;
 - (iii) the contractor claim was not caused by the mismanagement of Spokane County;
 - (iv) the contractor claim was not caused by Spokane County's vicarious liability for the improper actions of others;


- (v) the claimed amount is reasonable and necessary;
- (vi) the claim for such costs is filed by Spokane County within 5 years of completion of the preauthorized activities; and
- (vii) payment of such a claim will not result in total payments from the Fund in excess of the amount preauthorized.

Discussion:

"Contractor claim" means the disputed portion of a written demand or written assertion by any contractor who has contracted with Spokane County pursuant to the Consent Decree to perform the remedial action, seeking as a matter of right, the payment of money, adjustment, or interpretation of contract terms, or other relief, arising under or related to a contract, which has been finally rejected or not acted upon by Spokane County and which is subsequently settled by Spokane County or an award by a Third Party through the Disputes Clause of the contract document.

- f) An award by a third party on a contractor claim should include:
 - (i) findings of fact;
 - (ii) conclusions of law;
 - (iii) allocation of responsibility for each issue;
 - (iv) basis for the amount of award; and
 - (v) the rationale for the decision.
- g) Interest accrues on amounts due Spokane County pursuant to this agreement where EPA fails to pay the amount within sixty (60) days of EPA's receipt of a completed claim from Spokane County. A completed claim is a demand for a sum certain which includes all documentation required to substantiate the appropriateness of the amounts claimed. Where Spokane County submits a claim which is technically complete but for which EPA requires additional information in order to evaluate the amount claimed, interest will not accrue on the claim until sixty (60) days after EPA's receipt of the requested additional information. The rate of interest paid on a claim is the rate of interest on investments of the Superfund established by subchapter A of chapter 98 of the Internal Revenue Code of 1954.

- h) For a period not to exceed 5 years from completion of startup and verification, costs incurred for restoration of ground water shall be eligible for recovery until EPA determines that the ground water contaminant levels have been reduced to the levels as prescribed in the ROD.
- 19) If any material statement or representation made in the application for preauthorization is false, misleading, misrepresented, or misstated and EPA relied upon such statement in making its decision, the preauthorization by EPA may be withdrawn following written notice to Spokane County. Disputes arising out of EPA's determination to withdraw its preauthorization shall be governed by Section XXVII of the Consent Decree. Criminal and other penalties may apply (see Exhibit 3).
- 20) The Superfund is not hereby obligated to reimburse Spokane County for subsequent remedial actions not covered by this preauthorization caused by failure of the original remedy if those actions are necessary as a result of the failure of Spokane County, their employees or agents, or any third party having a contractual relationship with Spokane County to properly perform activities under the Work Plan and any modification thereto approved by EPA and in conformance with the terms and conditions of this preauthorization decision document. The foregoing shall not apply if the remedy fails for any other reason. EPA may require Spokane County to submit any additional information needed to determine whether the actions taken were in conformance with the Work Plan and were reasonable and necessary.
- 21) This preauthorization shall be effective as of the date of entry of the Consent Decree by the Court.

 9/30/88
Henry L. Longest Jr. Date
Director, Office of
Emergency and Remedial Response

EXHIBITS

1. EPA Record of Decision for the Colbert Landfill Site
2. Consent Decree
3. Civil and Criminal Penalties

EXHIBIT 3

CERCLA PENALTY FOR PRESENTING FRAUDULENT CLAIM

Any person who knowingly gives or causes to be given false information as a part of a claim against the Hazardous Substance Superfund may, upon conviction, be fined in accordance with the applicable provisions of title 18 of the United States Code or imprisoned for not more than 3 years (or not more than 5 years in the case of a second or subsequent conviction), or both. (42 USC 9612 (b)(1).)

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant is liable to the United States for a civil penalty of \$2,000, and an amount equal to two times the amount of damages sustained by the Government because of the acts of that person, and costs of the civil action. (31 USC 3729 and 3730.)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

The claimant will be charged a maximum fine of not more than \$10,000 or be imprisoned for a maximum of 5 years, or both. (See 62 Stat. 698, 749; 18 USC 287, 1001.)